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No. 11-

IN THE

Supreme Court of the United States

CABLE, TELECOMMUNICATIONS, AND TECHNOLOGY COMMITTEE OF THE NEW ORLEANS CITY COUNCIL,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSIONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should *Chevron* deference be afforded to an administrative agency's interpretation of its own statutory jurisdiction?

2. If it is determined that an agency's interpretation of its own statutory jurisdiction should be evaluated under *Chevron*, did the Fifth Circuit improperly apply *Chevron*?

3. Did the FCC usurp the jurisdiction and authority reserved for State and local governments by Congress in its interpretation of 47 U.S.C.A. § 332 (C)(7) by creating additional limitations on state and local governments beyond those provided for in the statute?

PARTIES TO THE PROCEEDING

Intervenor-Petitioner:

1. Cable and Telecommunications Committee (Now Cable, Telecommunications, and Technology Committee) of the New Orleans City Council

Plaintiffs/Intervenors:

1. City of Arlington, Texas
2. City of San Antonio, Texas
3. City of Glendale, California
4. EMR Policy Institute
5. City of Dallas, Texas
6. City of Los Angeles, California
7. City of Portland, Oregon
8. Los Angeles County, California
9. San Diego County, California
10. Texas Coalition of Cities for Utility Issues
11. Fairfax County, Virginia

Defendants-Respondents:

1. Federal Communications Commission

2. United States of America

3. CTIA - The Wireless Association

All of the parties listed above are being served as Respondents, other than the Petitioner.

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OTHER AUTHORITIES

Petitioner, the Cable, Telecommunications, and Technology Committee of the New Orleans City Council, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's unreported denial of the Petition for Rehearing En Banc of Intervenor Cable and Telecommunications Committee of the New Orleans City Counsel and denial of the Petition for Rehearing En Banc of Intervenors City of Dubuque, Iowa; City of los Angeles, California; Los Angeles County, California; Texas Coalition of Cities for Utility Issues; and Petitioner City of Arlington Texas is dated March 29, 2012.

The reported opinion of the United States Court of Appeals for the Fifth Circuit in *The City of Arlington Texas v. Federal Communications Commission, et al.*, is dated January 23, 2012.

The FCC's reported Order denying the Petition for Reconsideration of the Declaratory Ruling *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance* is dated August 3, 2010.

The FCC's reported Order denying the Emergency Motion for Stay of the Declaratory Ruling *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review*

and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance is dated January 29, 2010.

The FCC Declaratory Ruling *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance* is dated November 18, 2009.

All of the above decisions have been set forth in a petition for a writ of certiorari filed, or to be filed, by the City of Arlington in this matter.

JURISDICTION

The Federal Communications Commission (the "FCC") issued an Order on November 18, 2009,[1] granting part of the petition of CTIA - The Wireless Association ("CTIA") and establishing new rules interpreting portions of Section 332(c)(7) of the Telecommunications Act of 1996 (the "Order").[2]

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1. *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance*, 24 F.C.C.R. 13994 (2009).

2. Pub. L. 104-104, 110 Stat. 56 (February 8, 1996). The Telecommunications Act of 1996 was enacted to amend certain sections of the Communications Act of 1934, 48 Stat. 1064. The Communications Act is codified as amended at 47 U.S.C. § 151 *et seq.*

An Emergency Motion for Stay was filed on December 17, 2009, by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, and denied on January 29, 2010.[3]

A Petition for Reconsideration of the FCC Declaratory Ruling was filed on December 17, 2009 by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, and denied on August 3, 2010 (the "Reconsideration Order").[4]

A Panel of the U.S. Court of Appeals for the Fifth Circuit issued an Opinion on January 23, 2012, dismissing the Petition for Review of the Reconsideration Order of the City of San Antonio, and denying the Petition for Review of the Reconsideration Order of the City of Arlington (the "Panel Opinion").[5]

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3. *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance*, 25 F.C.C.R. 1215 (2010).

4. *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance*, 25 F.C.C.R. 11157 (2010).

5. *City of Arlington Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012).

The U.S. Court of Appeals for the Fifth Circuit denied a Petition for Rehearing En Banc on March 8, 2012, filed by Intervenor Cable and Telecommunications Committee of the New Orleans City Council, and denied a Petition for Rehearing En Banc on March 8, 2012, filed by Intervenors City of Dubuque, Iowa, City of Los Angeles, California, Los Angeles County, California, Texas Coalition of Cities for Utility Issues, and Petitioner City of Arlington, Texas.

It is from the en banc denial that Petitioners request a writ of certiorari from this Court. Jurisdiction to review the Fifth Circuit's judgment denying the Petition for Review of the Reconsideration Order by a writ of certiorari is conferred on this Court by 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

47 U.S.C.A. § 332 (C)(7) provides:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities

comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not

mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

STATEMENT OF THE CASE

Section 332(c)(7) was adopted as part of the Telecommunications Act of 1996 ("Telecommunications Act"), 47 U.S.C. § 151 *et seq.* It provided certain statutory protections to an applicant who applies for siting of a personal wireless service facility such as a cell phone tower. These protections are in addition to the standard protections afforded by equal protection, due process, and state law.

When Congress adopted Section 332(c)(7), it did so amidst trying to balance local police powers in regulating the build out of commercial mobile radio services ("CMRS") infrastructure, and the development of a competitive and efficient marketplace for telecommunications providers.[6] The Conference Report ("Report") regarding Section 332(c)(7) clearly sets forth Congress' intention as to this Section; that "other than Section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section."[7] The FCC did retain authority in one area - radio frequency rules - and the

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6. CTIA's Petition for Rulemaking, In re Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Service Providers, RM 8577, at 17 (December 22, 1994).

7. H.R. Rep. No. 104-204, at 25 (1995).

authority to hear complaints regarding local regulation of radio frequency emissions.

The Report further directed ***the courts*** to measure State and local authorities' reasonableness and timeliness with the "generally applicable time frames for zoning decision" in a particular community,[8] and stated that "any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMRS facilities should be terminated."[9]

Despite this clarity, on July 11, 2008, the CTIA filed a petition requesting that the FCC clarify portions of Section 332(c)(7).[10] The FCC improperly assumed jurisdiction and proceeded to establish new rules, including a new requirement under Section 332(c)(7)(B)(ii) defining "a reasonable time" to mean 90 and 150 days for State and local authorities to act on personal wireless service facility siting applications;[11] declaring that it is a "failure to act" under Section 332(c)(B)(v) by the State or local authority if it does not act within these time frames;[12] and declaring that upon expiration of the established time frames, a wireless provider has 30 days in which it may sue a State or local authority for failure to act on its

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8. *Id.*

9. *Id.*

10. CTIA Petition.

11. Order, ¶ ¶ 4, 32, 37, 45.

12. Order, ¶ ¶ 4, 32, 37, 39.

application.[13] The FCC further found that the State or local government may toll the time frame by notifying an applicant within 30 days of receipt, that the application is incomplete.[14]

Five organizations[15] filed a Petition for Reconsideration of the FCC Declaratory Ruling on December 17, 2009, which was denied on August 3, 2010 (the "Reconsideration Order").[16] The City of Arlington, Texas then filed a Petition for Review of the Reconsideration Order with the Fifth Circuit on January 14, 2010, and on October 1, 2010, the City of San Antonio filed a Petition for Review of the Reconsideration Order.[17] The cases were considered under the same docket number, and the Cable and Telecommunications Committee of the City of New Orleans, intervened.

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13. Order, 13994 (2009), ¶ 49. The FCC also found that the "reasonable period of time" can be extended by the mutual consent of the State or local government and the personal wireless service provider, and that in such a situation, the 30 day period would be tolled. *Id.*

14. Order, ¶ 53.

15. The five organizations are: National Association of Telecommunications Officers and Advisors ("NATOA"), the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association.

16. Reconsideration Order ¶ 7.

17. The jurisdiction of the Fifth Circuit was based on 47 U.S.C.A. 402(a) and 28 U.S.C.A. 2344.

A Panel of the Fifth Circuit issued its Opinion on the petitions on January 23, 2012, dismissing the City of San Antonio's petition for failure to timely file, and denying the City of Arlington's petition.[18] The Panel held, in pertinent part, that: (1) the FCC's Declaratory Ruling was the product of adjudication and not rulemaking, and the lack of strict compliance with the notice and comment requirements was harmless;[19] (2) the due process rights of State and local governments were not violated by the failure of the FCC to individually serve copies of the CTIA's Petition on each State or local government;[20] (3) the FCC did possess the statutory authority, as analyzed under the Chevron standard, to interpret the language of 322(c)(7) and impose the 90 and 150 day time frames for the application process;[21] (4) the 90 and 150 day time frames are permissible interpretations of the statute and hold up under the Chevron standard;[22] and (5) the FCC's establishment of the 90 and 150 day time frames were not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

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18. *City of Arlington Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012).

19. *Id* at 16, 20.

20. *Id* at 25.

21. *Id* at 39.

22. *Id* at 41.

REASONS FOR GRANTING THE PETITION

There are a myriad of reasons to grant this writ application. However, for sake of brevity and emphasis two of those reasons are discussed here. Specifically, the Fifth Circuit Panel (the "Panel") should not have applied *Chevron* deference because: (a) application of such deference on the whole is improper logically; and (b) even if such deference is proper, it is not proper in this instance given the language of the statute. Additionally, the Panel's decision improperly allows the FCC to usurp the jurisdiction and authority Congress reserved for the state and local governments.

I. APPLICATION OF *CHEVRON* DEFERENCE TO THE FCC'S INTERPRETATION OF ITS OWN STATUTORY JURISDICTION BY THE FIFTH CIRCUIT PANEL WAS IMPROPER.

The Panel held that §332(c)(7) is ambiguous with respect to the FCC's authority to establish time frames. It reasoned that although the statute bars the FCC from using its general rule making power under the Telecommunications Act to create additional limits on state and local governments beyond those provided in section (B), since the statute didn't explicitly deny the FCC general authority to implement section (B)'s limitations, it is silent on the issue and therefore ambiguous. In other words, the Panel held that, despite the other unambiguous language in the statute, because the statute did not explicitly foreclose the FCC from setting limits on time frames under section (B), it was ambiguous. It therefore concluded that *Chevron* deference should be applied.

This application is improper and should be reversed by this Court for a number of reasons. First, this Court has yet to address the issue. Second, deference poses an unacceptable risk of agency aggrandizement. Finally, agencies can claim no special expertise in interpreting a statute confining its jurisdiction.

(A) This Court has never ruled on whether *Chevron* deference should be afforded to an agency's interpretation of its own statutory jurisdiction.

The Panel determined that it would afford *Chevron* deference to the FCC's interpretation of its own jurisdiction, but pointed out that there is a difference in opinion among the courts of whether this is the proper approach. The Panel reasoned:

> The Supreme Court has not yet conclusively resolved the question of whether Chevron applies in the context of an agency's determination of its own statutory jurisdiction,[23] and the circuit courts of appeals have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope

23. *See Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) (collecting cases and observing that the Supreme Court has yet to resolve the debate over whether *Chevron* applies to disputes about the scope of an agency's jurisdiction).

> of an agency's jurisdiction,[24] some do not,[25] and some circuits have thus far avoided taking a position.[26] In this circuit, we apply *Chevron* to an agency's interpretation of its own jurisdiction, and therefore, we will apply the *Chevron* framework when determining whether the FCC possessed the statutory authority to establish the 90- and 150-day time frames.[27]

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24. *See, e.g., Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145-46 (10th Cir. 2010) (en banc) ("Of course, courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, ... including statutory ambiguities affecting the agency's jurisdiction..." (Internal citations omitted)); *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988) ("When Congress has not directly and unambiguously addressed the precise question at issue, a court must accept the interpretation set forth by the agency so long as it is a reasonable one. ... This rule of deference is fully applicable to an agency's interpretation of its own jurisdiction." (Internal citation omitted)).

25. *See, e.g., N. Ill. Steel Supply Co. v. Sec'y of Labor* 294 F.3d844, 846-47 (7th Cir. 2002) (concluding that de novo review is appropriate for questions involving an agency's determination of its own jurisdiction); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998) (reviewing agency's legal conclusion regarding the scope of its own jurisdiction without deference to the agency's determination).

26. *See Pruidze*, 632 F.3d at 237 (leaving the question unanswered); *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (same).

27. *Texas v. United States*, 497 F.3d 491, 501 (5th Cir. 2007) (observing that *Chevron* step one applies to "challenges to an agency's interpretation of a statute, as well as whether the statute confers agency jurisdiction over an issue"); *Tex. Office of Pub.*

> Thus, this matter is ripe for adjudication by this Court. It directly presents an issue of an agency, and the Panel, interpreting supposed Congressional silence as an ambiguity allowing deference under *Chevron*. Said deference resulted in the usurpation of State and local authority on exclusively state and local issues.

(B) Deference poses an unacceptable risk of agency aggrandizement and agencies can claim no special expertise in interpreting a statute confining its jurisdiction.

In Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation.[28] Agencies have no inherent authority. They have no more jurisdiction than Congress has clearly provided. Thus, where a statute is silent on the existence of agency jurisdiction, as the Panel has claimed here, *Chevron* should not be implicated and courts should presume that no jurisdiction exists.[29] Failure to do so

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Util. Counsel v. FCC, 183 F.3d 393, 440-46 (5th Cir. 1999) (applying *Chevron* to a question concerning the scope of the FCC's statutory authority to provide universal service support for schools, libraries, and rural health-care providers); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) (per curiam) ("[T]his circuit has accorded deference to an agency's determination of its own statutory authority.").

28. Norman J. Singer, 3 Statutes and Statutory Construction §65.2 (2001) ("[T]he general rule applied to statutes granting powers to [agencies] is that only those powers are granted which are conferred either expressly or by necessary implication.").

29. *See Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 8 (2000).

could lead to dangerous precedent being created resulting in the diminishing of State and local authority on State and local issues.

As Justice Brennan pointed out, *Chevron* deference poses an unacceptable risk of agency aggrandizement.[30] Specifically, Congress's evident policy "in favor of limiting the agency's jurisdiction" might be frustrated by "the agency's institutional interests in expanding its own power."[31] This unreasonable and unnecessary risk is far too great given the potential outcome of neutering State and local authority.

Furthermore, the suggestion that agencies have more familiarity with and expertise in the statute in question and subject matter has no merit. As Justice Brennan noted, "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies.[32] Courts should not presume that Congress implicitly intended an agency to fill "gaps" in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power.[33]

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30. *See Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting).

31. *Id.*

32. *Id.*

33. *Id.; see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841-847, 106 S.Ct. 3245, 3252-3255, 92 L.Ed.2d 675 (1986) (citing statutory language and legislative history demonstrating that the agency was delegated broad

II. EVEN IF *CHEVRON* WAS TO BE CONSIDERED, THE FIFTH CIRCUIT IMPROPERLY APPLIED *CHEVRON* BECAUSE THE ELEMENTS ARE NOT MET IN THIS INSTANCE.

Even if *Chevron* deference is to be applied to the FCC's interpretation of § 332(c)(7)(B), the Fifth Circuit Panel did not conduct a proper *Chevron* analysis. The Panel concluded that § 332(c)(7) is ambiguous, with respect to the FCC's authority to establish a 90 and 150 day deadline for municipalities to act on an application regarding the placement and construction of wireless communications facilities. Specifically, the Panel reasoned that "[a]lthough the statute clearly bars the FCC from using its general rulemaking powers under the Communications Act to create additional limitations on state and local governments beyond those the statute provides in § 332(c)(7)(B), the statute is silent on the question of whether the FCC can use its general authority under the Communications Act to implement § 332(c)(7)(B)'s limitations."[34]

The Panel's conclusion of silence resulted in it summarily dispatching with the first step of analysis

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authority to determine which counterclaims to adjudicate); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829, 104 S.Ct. 1505, 1510, 79 L.Ed.2d 839 (1984) (deferring to agency interpretation of statute defining the scope of employees' right to engage in concerted activities under the National Labor Relations Act). It is thus not surprising that this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction.

34. *See* Panel Opinion at page 34.

of *Chevron*, and moving directly to the second step of analysis, which requires deference to the FCC's Order if the FCC's interpretation is based on a permissible construction of the statute. However, this limited incomprehensive analysis actually resulted in its decision conflicting with *Chevron* on the issue of ambiguity.

(A) Section 332(c)(7) is not ambiguous.

Specifically, as part of the Telecommunications Act, Congress amended the Communications Act of 1934 by adding Section 332(c)(7). That provision, codified as 47 U.S.C. § 332(c)(7), restricts the authority of State and local governments with respect to decisions regarding the placement and construction of wireless communication facilities. It reads:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

> (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.[35]

The Cable, Telecommunications, and Technology Committee of the New Orleans City Council has argued that subsection (v) clearly limits the jurisdiction of the FCC relative to the implementation of § 332(c)(7)(B). Despite this clear language, the Panel held that the statute is ambiguous under *Chevron*. Yet, this conclusion was reached without actually performing a sufficient *Chevron* analysis.

Specifically, the *Chevron* court recognized that "[t]he power of an administrative agency to administer a congressionally created ... program necessarily requires the formation of a policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[36] However, the Court further recognized that in determining whether

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35. 47 U.S.C. § 332 (c)(7).

36. *Chevron, USA, Inc. v. Natural Resource Defense Counsel, Inc., et al.*, 467 U.S. 837, 843 (1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

a gap has *actually* been left by Congress, a court must employ the traditional tools of statutory construction.[37]

These traditional tools require the courts to begin with the premise that a statute is only ambiguous if it is reasonably susceptible of more than one accepted meaning.[38] In interpreting a statute, a court must begin with its plain language.[39] In doing so, courts look not only to "the particular statutory language at issue," but also to "the language and design of the statute as a whole."[40] Additionally, a statute's legislative history can be crucial in this analysis.[41] It is only when these traditional methods of statutory construction fail to reveal a provision's meaning that a court may conclude that the statute is ambiguous.[42]

There is no question that § 332 (c)(7)(B)(v) establishes sole jurisdiction in the courts over all disputes arising

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37. *See Chevron* at 843 (footnote 9).

38. *See United Services Auto Association v. Perry*, 102 F.3d 144 (5th Cir. 1996); *see also MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); Norman J. Singer, 2A Sutherland Statutory Construction § 45.02 (5th ed. 1992).

39. *See White v. INS*, 75 F.3d 213, 215 (5th Cir.1996); *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir.1990).

40. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citing *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403-05 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21, (1986).

41. *Pruidze, supra* note 23.

42. *See Chevron*, 467 U.S. at 843 & n. 9.

under § 332(c)(7)(B)(ii). Even the Panel acknowledged this fact in its opinion.[43] There is no ambiguity on that issue, as Congressional intent is clear. Given same, the court must give effect to the unambiguously expressed intent of Congress.[44]

(B) The Panel's finding of ambiguity is unreasonable.

Recognizing that congressional intent is clear on the issue of jurisdiction over disputes under § 332(c)(7), the Panel side-steps the actual language of the statute and tries to create an ambiguity not in what the statute says, but in what it does not say. The entirety of the Panel's analysis is essentially summed up as follows:

> The cities contend that, by establishing jurisdiction in the courts over specific disputes arising under § 332 (c)(7)(B)(ii), Congress indicated its intent to remove that provision from the scope of the FCC's general authority to administer the Communications Act. The cities read too much into § 332 (c)(7)(B)(v)'s terms, however. Although § 332 (c)(7)(B)(v) does clearly establish jurisdiction in the courts over disputes arising under § 332 (c)(7)(B)(ii), the provision does not address the FCC's power to administer § 332 (c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act. Accordingly, one

43. *See* Panel opinion at pg. 32.

44. *See Chevron*, 467 U.S. at 842-3 & n. 9.

> could read § 332 (c)(7) as a whole as establishing a framework in which a wireless service provider must seek as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332 (c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision.[45]

This analysis would no-doubt be rational, but for the last sentence of § 332 (c)(7)(B)(v). In that last sentence, Congress specifically stated what power and jurisdiction was enumerated to the FCC, and it ***did not*** include the ability to, in any way, administer § 332 (c)(7) except as articulated, including providing *guidance* to the courts relative to disputes under the provision. In other words, the Panel's analysis is faulty and unreasonable because it focuses solely on what the statute does not say and interprets that as a gap, rather than focusing on what the statute *does* say. Under *Chevron*, the Panel should have focused on the plain language of the statute. The plain language of the statute granted very limited power and jurisdiction to the FCC. If a statute delegates regulatory authority to an agency to address some matters but not others, then it would be inappropriate to presume that Congress has delegated further authority to an agency to assert further authority on its own initiative.[46]

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45. *See* Panel opinion at pg. 32.

46. *See* Nathan Alexander Sales, The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences, 2009 U.Ill. L. Rev. 1497, 1531 (2009).

The Panel interprets the lack of some specific general admonition against FCC jurisdiction as an ambiguity. Specifically, it stated that "[h]ad Congress intended to insulate § 32(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly because Congress surely recognized that it was legislating against the background of the Communications Act's general grant of rulemaking authority to the FCC."[47] However, the requirement of a general admonition is unreasonable and unnecessary. There was no need to tell the FCC specifically what it could not do, because Congress *specifically* told the FCC all it *could* do. Thus, by only granting to the FCC specific power and jurisdiction, the only reasonable interpretation is that Congress *specifically did not* grant to the FCC any other power and jurisdiction, including the power to create a time line by which municipalities must abide. A statute delegates the authority it delegates, and the rest is silence. Failure to disclaim agency authority to regulate is not, in itself, an ambiguity about whether an agency does or should have regulatory authority.[48]

The Panel's decision, therefore, conflicts with *Chevron*, as it does not analyze the plain language of the statute. Rather, it ignores language in the statute and creates an ambiguity, which is unreasonable if applied with the language it chose to ignore.

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47. *See* Panel opinion at pg. 31.

48. *See* Nathan Alexander Sales, The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences, 2009 U.Ill. L. Rev. 1497, 1532 (2009).

III. THE FIFTH CIRCUIT'S DECISION IMPROPERLY ALLOWS THE FCC TO USURP THE JURISDICTION AND AUTHORITY CONGRESS RESERVED FOR THE STATE AND LOCAL GOVERNMENTS AND THE COURTS.

The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction,[49] and the circuit courts of appeals have adopted different approaches to the issue. The Panel acknowledged that the Fifth Circuit applies *Chevron*, but it improperly interpreted *Chevron*. This improper interpretation allows an agency to usurp the jurisdiction and authority Congress specifically reserved for the State and local governments, as well as the courts.

(A) The 90 and 150 day time frames improperly impose additional limitations on State and local governments.

All parties, even the FCC, acknowledge that at the very least § 332(c)(7) precludes the FCC from imposing additional limitations on State and local government authority over the wireless facility zoning process. The Panel, however, adopted the FCC's argument that the time frames did not place additional limitations on state and local governments. This argument has no merit.

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49. *See Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) (collecting cases and observing that the Supreme Court has yet to resolve the debate over whether *Chevron* applies to disputes about the scope of an agency's jurisdiction.

The FCC's imposition of a 90 and 150 day time frame for the review of siting applications *is* an additional limitation on the specifically reserved State and local powers pursuant to zoning, as Congress clearly intended for such requests to be acted on within "a reasonable period of time ... taking into account the nature and scope of such request."[50] Whereas State and local authorities previously had to act upon a request within a reasonable period of time depending on the circumstances, they now must act within a *definite* time frame or be found to have failed to act at all. This is clearly an additional limitation and an improper usurpation of the State and local authority.

(B) The Panel's reliance on the fact that the courts retain the final determination of reasonableness is misplaced.

Throughout the opinion, the Panel puts a strong emphasis on the fact that the courts continue to have jurisdiction over the final determination of whether or not an application was timely processed. However, the Panel misunderstands the effect of the power it grants not only to the FCC, but also to wireless applicants.

Congress intended the determination of what is reasonable under a given situation to remain with the courts, not with the FCC. The legislative history supports the fact that the reasonableness of review time of siting applications is to be determined by the courts. Specifically, the legislative history provides:

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50. 47 U.S.C. 332(c)(7)(B)(ii).

> It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) [regarding the effects of radio frequency emissions] ... the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile services] facilities shall be terminated.[51]

Now that the FCC has imposed the 90 and 150 day time frames, this exclusive jurisdiction of the courts has been removed. If an application is not reviewed within these time frames, the State or local government will be considered to have "failed to act" under the statute. The fact that a court may review the dispute to determine if the government acted reasonably does not change the fact that the "failure to act" of the State or local government has already been determined because of their failure to comply with the time frames.

(C) The Panel has created a dangerous precedent resulting in the erosion of State and local authority.

If the Panel's decision is upheld, a dangerous precedent will be created in that agencies will not have to adhere to Congressional intent to retain State and local government authority. This will broaden agency authority to a degree it has never before reached. The Panel's ruling that the clause "nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality

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51. See H.R. Conf. Rep. No. 104-458, at 208 (1996).

thereof..." is ambiguous could allow agencies to comb through all legislation for similar phrases to expand their authority beyond what Congress intended.

(1) Congress intended to preserve, not preempt, local zoning authority.

Congress enacted the Telecommunications Act of 1996 ("Telecommunications Act"), 47 U.S.C. § 151 *et seq.*, "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers, and encourage the rapid deployment of new telecommunications technologies."[52] Among the technologies addressed by Congress in the Telecommunications Act was wireless communications services.

In regard to this technology, Congress found that "siting and zoning decisions by non-federal units of government" had "created an inconsistent and, at times, conflicting patchwork of requirements" that was inhibiting the deployment of wireless communications services.[53] At the same time, however, Congress recognized that "there are legitimate State and local concerns involved in regulating the siting of such facilities . . ., such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way."[54]

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52. Pub.L. No. 104-104, 110 Stat. 56, 56 (1996); *see VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 828-829 (7th Cir. 2003).

53. H.R. Rep. 104-204, at 94 (1995); *see St. Croix County*, 342 F.3d at 828-829.

54. *Id.*

To address the problems created by local zoning decisions, the House version of the Telecommunications Act would have given authority to the FCC to regulate directly the siting of wireless communications towers. The Conference Committee, however, decided against complete federal preemption, opting to "preserve the authority of State and local governments over zoning and land use matters except in limited circumstances."[55]

Therefore, § 332(c)(7) strikes a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications facilities.[56] Under that section, state and local governments retain the authority to regulate the siting of wireless telecommunications facilities, but their decisions are subject to certain procedural and substantive limitations.[57]

Accordingly, the Telecommunications Act ***does not*** preempt State or local governments from regulating the siting of wireless towers. Consequently, as it was not directly given such power, the FCC does not have the authority to directly regulate the siting of wireless communications towers.

(2) The FCC clearly exceeded its authority.

Despite Congress's explicit intention to preserve State and local zoning authority, the FCC established

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55. *See* H.R. Conf. Rep. No. 104-458, at 207-08 (1996);see *St. Croix County*, 342 F.3d at 828-829.

56. 47 U.S.C. § 332(c)(7)

57. *See* 47 U.S.C. § 332(c)(7); *see St. Croix County*, 342 F.3d at 828-829.

tower siting rules that essentially preempt State and local zoning laws. Consequently, the FCC simply ignored the previously cited unambiguous language in 47 U.S.C. § 332(c)(7).

The FCC does not administer 47 U.S.C. § 332(c)(7). Instead, Congress specifically wanted local government to retain the right to determine how and where towers should be placed.[58] Consequently, the action by the FCC to intrude on the local decision-making process runs contrary to Congressional intent and should be overruled as such.

Furthermore, unless preemption was the clear and manifest intent of Congress, local zoning laws may not be preempted.[59] Within the Telecommunications Act, Congress clearly did not intend for local zoning laws to be preempted by federal law, except with respect to radio-frequency emissions. In fact, when considering this legislation, Congress decided *against* federal preemption, instead opting to "preserve the authority of State and local governments over zoning and land use matters except in limited circumstances."[60]

More importantly, Congress did not want the FCC to develop a uniform policy for the siting of wireless tower sites, but rather, Congress wanted the courts to have exclusive jurisdiction over all disputes regarding the placement, construction, and modification of personal

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58. 47 U.S.C. § 151 *et seq.*

59. *See Gregory v. Aschcroft*, 501 U.S. 452, 460-461 (1991).

60. See H.R. Conf. Rep. No. 104-458, at 207-08 (1996);see *St. Croix County*, 342 F.3d at 828-829.

wireless service facilities. Specifically, the legislative history provides that:

> It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) [regarding the effects of radio frequency emissions]. . . the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile services] facilities shall be terminated.[61]

In fact, even the FCC itself has recognized that the courts have exclusive jurisdiction over zoning disputes, (except in radio-frequency emissions cases), and that "the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation."[62] Yet, in its Order the FCC has overstepped its authority and altered the local process and procedure for approving a tower siting request. Thus, there is no question that this action is contrary to Congressional intent and therefore prohibited by the Telecommunications Act—*i.e.*, the Telecommunications Act shall not modify, impair or supersede local law "unless expressly so provided in such Act."[63]

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61. *See* H.R. Conf. Rep. No. 104-458, at 208 (1996).

62. *Federal Guidelines for Local and State Government Authority over the Siting of Personal Wireless Service Facilities*, *available at* http://wireless.fcc.gov/siting/local-state-gov.html (last modified December 17, 2010).

63. *See* H.R. Conf. Rep. No. 104-458, at 212 (1996).

The Act does not expressly state that the FCC may modify, impair or supersede local zoning law, but instead, the Act expressly preserved local zoning authority. Accordingly, the Order of the FCC in this matter is contrary to law and Congressional intent and should be summarily overruled by this Court.

(3) Congress did not intend to establish specific deadlines on local authorities.

The Telecommunications Act provides that a local zoning authority must act on any request for authorization to place, construct, or modify personal wireless service facilities "within a reasonable period of time."[64] Specifically Section 332(7)(B)(ii) provides:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, *taking into account the nature and scope of such request.*[65]

Recognizing the complexities, as well as the multiple variances that can take place at the local level relative to siting applications, Congress did not specifically set a time frame or definition for "within a reasonable period of time." Congress realized that establishing a uniform, strict deadline for local governments to act upon a tower siting request would not be practical, because the nature and scope of each request are uniquely different.

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64. 47 U.S.C. § 332(7)(B)(ii).

65. Emphasis added.

Congress intended to give local governments flexibility—the objective criteria of reasonableness—with respect to zoning issues. For cities and towns, the issue of cell tower siting has long been an issue of great concern, but the Telecommunications Act effectively balances the needs of telecommunications providers and the zoning needs of local governments. Tower siting and planning are complex matters for governments, wireless providers, and citizens. The proper planning of wireless sites is critical to community aesthetics and to the safety of the public. Thus, many important issues have to be considered when addressing tower siting. For example: Is the site the least intrusive? Is the design the best possible? Is the compensation at a fair rate? What about the lease terms?

With these factors in mind, Congress recognized that establishing a specific time-period in which to approve a request is simply not practical. What may be a reasonable time to approve an application in rural farmland in Iowa may be unreasonable for a densely populated urban-area or a historical district.

Recognizing that each situation is different, (and that one size does not fit all), Congress preserved local zoning authority and provided that local government must act within a *reasonable* time on a request. Rules regulating the placement of towers must provide sufficient flexibility so that local zoning authority, wireless providers, and citizens can adapt to individual circumstances.

Furthermore, the "reasonable" standard does not give the local municipality carte blanche to drag its feet. Rather, Congress gave adversely affected parties the right to commence an action in a court of competent

jurisdiction, as the courts are capable of determining what is reasonable for a particular application and local municipality.

(4) The FCC's Order improperly creates a "shot clock" that shifts the burden to the local municipality and encourages non-cooperation by the applicant.

Unhappy that Congress did not establish specific deadlines relative to site applications, CTIA petitioned the FCC claiming that the "reasonable period of time" standard was ambiguous. Specifically, CTIA asked the FCC to re-write the Telecommunications Act to provide that the local government must act within 45 or 75 days and failure to do so would result in automatic approval.

While the FCC did not comply completely with CTIA's request, it was all too eager to usurp Congressional intent and local authority. In its Order, it apparently unilaterally interpreted what Congress constituted as a "reasonable period of time" and a "failure to act" under Section 332(c)(7) of the Telecommunications Act.

Specifically, it found that 90 days for processing collocation applications, and 150 days for processing applications other than collocations, are generally reasonable time frames. It further determined that failure to meet the applicable time frame presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days. While the FCC did define the designation of a failure to act as a rebuttable presumption, creating such a presumption effectively shifts the burden to the local municipalities relative to the application(s) at issue.

The FCC's Order on this issue is improper for all the reasons previously articulated: it was not granted the authority to make such a ruling by Congress; it is an improper usurpation of local authority; it provided no justification for claiming such authority; etc. However, the Order additionally reeks of impracticality and thoughtlessness.

First, jurisprudence has already established that each situation must be independently examined when determining whether a local authority rendered a decision in a reasonable amount of time, taking into account the nature and scope of such request.[66] As each situation must be reviewed on a case-by-case basis, the "reasonable time" standard is appropriate. Also, issues regarding whether a zoning board failed to render a decision within a reasonable period of time are the least litigated, and wireless providers have generally failed to convince a court that a municipality erred in meeting this requirement.[67]

Recognizing the need for flexibility associated with tower siting requests, Congress preserved the local governments' authority to act "within a reasonable period of time." Thus, any bright-line rule (requiring local government to act within 90 or 150 days) is contrary to Congress' intent.

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66. *Cellular Telephone Co. v. Zoning Bd. of Adjustment of Borough of Ho-Ho-Kus*, 24 F.Supp.2d 359 (D.N.J. 1998).

67. Jeffery A. Berger. *Efficient Wireless Tower Siting: an Alternative to Section 332(c)(7) of the Telecommunications Act of 1996*, 23 Temp. Envtl. L. & Tech. J. 83, 97 (Fall 2004).

In addition, enacting the proposed deadlines has the effect of giving preferential treatment to telecommunication providers. That is, tower siting applications will be expedited or fast-tracked and acted upon ahead of other zoning applicants. Local zoning ordinances may seem burdensome to telecommunications providers, but it is no greater a hurdle than that faced by all other businesses who are applying to build in any given city or town. A wireless provider should not be treated more favorably than any other zoning-permit applicant.

Also, the "shot clock" rule established by the FCC is backwards. The rule allows the applicant to run out the clock in order to get tower siting approval. In other words, the rule creates a *disincentive* for applicants to cooperate with the local zoning authority. The rule could create the mind set of obstruction as the applicant may think that if he/she/it holds the ball long enough, then the applicant may be rewarded with a presumption of site approval.

Furthermore, the deadlines established by the FCC simply do not provide sufficient time for local zoning authorities to act on the request. For example, in addition to the exhaustive review process that must take place, and given that most municipalities hold only one legislative meeting per month, the review process and the legislative calendar would make it difficult for the municipality to meet the deadlines established by the FCC. Yet, it appears that the FCC did not take into account any of the variances.

Additionally, the proposed 90 and 150 day deadlines are not supported by prior court decisions. For example, one court held that a six month delay was a reasonable

period of time for a zoning board to mull over the permit, even though the zoning board usually took only two to three months to make such a decision.[68] Another court decided that a two and a half year delay was a reasonable period of time under the Act, even though the zoning board held over forty-five public hearings and still did not reach a firm conclusion, which perhaps signified that the board was stalling in its approval process.[69] Further, another court held that a four month delay was a reasonable period of time.[70]

Congress, therefore, did not intend to impose uniform, specific deadlines upon the local zoning authorities. Rather, Congress recognized that each tower siting request is different. The Telecommunications Act provides that the local government shall act on the request in a reasonable period of time "*taking into account the nature and scope of such request.*" That is, Congress realized that establishing a uniform, strict deadline for local government to act upon a tower siting request would not be practical because the nature and the scope of each request are uniquely different. In view of the particular circumstances, 150 days to approve a specific tower siting

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68. *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F.Supp. 732 (C.D.Ill.1997) (A six month decision making process by defendant was not a failure to act with in a reasonable time).

69. *Cellular Telephone Co. v. Zoning Bd. of Adjustment of Borough of Ho-Ho-Kus*, 24 F.Supp.2d 359 (D.N.J.1998) (A two and half year delay was not a failure to act with in a reasonable time.)

70. *USCOC of Greater Missouri, LLC v. City of Ferguson, Mo.*, 2007 WL 4218978, 7 (E.D.Mo. 2007) (A four month delay was not a failure to act in a reasonable time under the Act.)

request may be reasonable for one particular situation, but unreasonable for another.

Nevertheless, despite these examples of jurisprudential support for a "reasonable" period of time standard and not exact deadlines, as well as Congress' specific desire not to establish a specific deadline, the FCC chose to ignore this precedent, and the intent of Congress, and enact its own arbitrary deadline. Accordingly, the deadlines established by the FCC in its Order are too short, unreasonable, unnecessary, and should be overruled by this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Honorable Court grant the petition to review the ruling of the Court of Appeals below.

Respectfully submitted,

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